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IN THE

Supreme Court of the United States

October Term, 1940.

No. 32.

FIDELITY UNION TRUST COMPANY and MINTON H. TWINCH, as Executors of the Last Will and Testament of Edith M. Peck, Deceased,

Petitioners,

vs.

ETHEL ADELAIDE FIELD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

RESPONDENT'S BRIEF.

RUSSELL C. MACFALL,
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THE COURT PRESS, N. Y. C.

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RESPONDENT'S BRIEF.

Opinions of the Courts Below.

The Findings of Fact and Conclusions of Law and Judgment of the District Court were rendered December 29, 1938, and will be found in the Transcript of Record, at pages 23, 24 and 25. There was no accompanying opinion. The opinion of the Circuit Court of Appeals for the Third Circuit was rendered December 20, 1939, and was reported under the title of *"Field* v. *Fidelity Union Trust Company, et al.,"* in 108 Fed. 2d, 521, and is set forth in full in the record (R., pp. 29 to 48).

Statement of Jurisdiction.

1. The date of the judgment of the Circuit Court of Appeals for the Third Circuit to be reviewed was December 20, 1939. The petition for a writ of certiorari was filed March 16, 1940 and granted on April 22, 1940.

2. The jurisdiction of the court to issue the writ of certiorari herein granted was invoked under Judicial Code, Section 240(a) as amended by the Act of February 13, 1925, 43 Stat. 938 (U. S. C. Title 28, Section 347).

Statement of the Case.

The issue presented by the case to the courts below was whether the proceeds of a savings bank account in the United States Savings Bank of Newark, New Jersey, the title of the account being "Edith M. Peck, in trust for Ethel Adelaide Field", was properly payable, upon the death of Edith M. Peck, to the named beneficiary, Ethel Adelaide Field, or to Miss Peck's executors. Mrs. Field, the beneficiary, claimed the proceeds of the account by virtue of the provisions of Chapters 40, 41, 42 and 43 of the New Jersey Laws of 1932 (printed in full at pp. 28 to 34 of the Petitioners' Brief), the relevant provisions thereof being as follows:

> Whenever any deposit shall be made with any savings bank, trust company or bank by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to the savings bank, trust company or bank, in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest thereon, shall be paid to the person in trust for whom the said deposit

was made, or to his or her legal representatives and the legal representatives of the deceased trustee shall not be entitled to the funds so deposited nor to the dividends or interest thereon notwithstanding that the funds so deposited may have been the property of the trustee; provided, that the person for whom the deposit was made, if a minor, shall not draw the same during his or her minority without the written consent of the legal representatives of said trustee.

The petitioners claimed the proceeds of the account as an asset of the estate of Edith M. Peck, upon the ground that the 1932 statute did not confer upon the named beneficiary any rights to the proceeds of the account and in support of their contention, cited two decisions of the New Jersey Court of Chancery, namely: *Thatcher* v. *Trenton Trust Company,* 119 N. J. Eq. 408, and *Travers* v. *Reid,* 119 N. J. Eq. 416, both of which were decided in January, 1936, a year after the decedent's death.

After trial, the District Court found for the petitioners (defendants below). Upon appeal, the United States Circuit Court of Appeals reversed the judgment of the District Court and awarded the proceeds of the account to the named beneficiary, upon the grounds that the New Jersey statute of 1932 entitled the beneficiary to the proceeds of the bank account upon the death of the creator and that the Federal courts were not bound to follow the contrary decisions of the Court of Chancery in the absence of a construction of the statutes by New Jersey's court of last resort.

The facts of the case are substantially stated at pages 2 and 3 of the Petitioners' Brief. One important fact was omitted from that statement, namely: that the Fidelity Union Trust Company, one of the executors now claiming the bank account as an asset of the estate, acting through Frank E. Lott, its Assistant Trust Officer, assisted

and advised the decedent a few days before her death in the creation of said account as a tentative trust account, upon the decedent's statement that upon her death she desired Mrs. Field to get the account (R., pp. 14 to 16).

The Issue.

The question presented is whether the Federal court, in determining the applicable local law, was bound by the two decisions of the New Jersey Court of Chancery, construing the New Jersey statute, in the absence of any decisions thereon by any New Jersey appellate court.

It is proper to state, at this point, that the respondent takes no serious issue with the authorities cited by the petitioners other than the *Thatcher* and *Travers* decisions. It will appear from the argument following that many of the cases relied upon by the petitioners amply support the respondent's case. Furthermore, it is submitted that it is unnecessary, in the determination of the present issue, to consider objectively the relative importance of the Court of Chancery and the Supreme Court of New Jersey in that state's judicial system, as the petitioners' third point attempts to do. But this departure from the essential issue will be hereinafter discussed.

ARGUMENT.

Summary of the Argument.

POINT I. The New Jersey statute of 1932 validated tentative trusts with respect to savings bank deposits, and entitled the respondent to the deposit upon the death of the trustee.

POINT II. In awarding the account to the respondent the Circuit Court of Appeals properly concluded that the decisions of the Court of Chancery did not truly express the local law.

POINT III. Until the effect of the 1932 statute is finally determined by New Jersey's court of last resort or at least by an authoritative Appellate Court of that State, the Federal courts are free to determine whether or not the decisions of the Court of Chancery truly express the local law.

POINT IV. The judgment of the Circuit Court of Appeals for the Third Circuit should be affirmed.

POINT I.

The New Jersey Statute of 1932 validated tentative trusts with respect to savings bank deposits, and entitled the respondent to the deposit upon the death of the trustee.

Savings-bank accounts of the kind here involved have been commonly referred to as tentative trusts. Such tentative trusts or savings bank trust accounts have been found socially desirable by many states, probably because they constitute a method whereby persons of small means may provide for disposition of their savings at death without the expense and trouble of administration. While obviously such accounts do not fulfil the strict requirements of a true trust or a valid gift, their validity has been recognized by the weight of authority. This general acceptance of the validity of such trusts is recognized in *Restatement of the Law of Trusts*, as follows:

"Sec. 58. TENTATIVE TRUST OF SAVINGS DEPOSIT. Where a person makes a deposit in a savings account

> in a bank in his own name as trustee for another person intending to reserve a power to withdraw the whole or any part of the deposit at any time during his lifetime and to use as his own whatever he may withdraw, or otherwise to revoke the trust, the intended trust is enforceable by the beneficiary upon the death of the depositor as to any part remaining on deposit on his death if he has not revoked the trust."

It is conceded that prior to the enactment of the 1932 laws, the courts of New Jersey uniformly refused to recognize the validity of such savings bank trust accounts. In an attempt to modify the law as determined by the courts, the New Jersey Legislature, in 1903, passed an act, *New Jersey Compiled Statutes 1910, page 5666, Sec. 32,* which provided:

> "Whenever any deposit shall be made by any person in trust for another and no other or further notice of the existence and terms of a legal and valid trust shall have been given to the trust company, in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest thereon, may be paid to the person for whom the said deposit was made, or to his or her legal representatives."

However, in 1930, the New Jersey courts held that the 1903 act was simply permissive and that it was not effective to change the earlier rule of law because it provided only that the deposit *may* be paid to the person for whom it was made, and that the purpose of the act was merely to protect the banks.

Shortly following such decisions, which awarded the proceeds of such accounts to the estates of the trustees, the New Jersey Legislature, obviously with the intent of changing the legal rule and with the intent of modifying the requirements of a valid trust as to bank accounts created

in trust for a named beneficiary, adopted the 1932 statute which provided that such an account, upon the death of the trustee, *shall* be paid to the person for whom the deposit was made and provided further *that the legal representative of the deceased trustee shall not be entitled to the funds so deposited nor to the dividends or interest thereon, notwithstanding that the funds so deposited may have been the property of the trustee.*

As there is no restriction upon the power of the legislature to modify by statute the theretofore existing law as to the necessary elements of a gift, or of a declaration of trust, or to provide and validate an additional method of creating a voluntary revocable trust, it follows that the courts exercising jurisdiction in New Jersey must give effect to the statute in those cases where it is applicable, unless the statute is so ambiguous as to fail to disclose the legislative intent or unless its provisions are clearly repugnant to the constitution of the State.

That this statute was accepted to mean exactly what it said at the time that the bank account in question was created by Miss Peck, in January, 1935, is indicated by the fact that the deceased was advised, prior to her death, by an Assistant Trust Officer of the petitioner, Fidelity Union Trust Company, to create this account in trust for Mrs. Field in such form, in order to effectuate Miss Peck's declared intent that in the event of her death Mrs. Field should obtain the proceeds, and that such form of account was approved for said purpose also by the auditor of the United States Savings Bank and so opened by said bank (R., pp. 14-16, 19, 20).

The majority opinions of the Circuit Court of Appeals indicate clearly that no fault could be found with this statute either as to the clarity of its intent or as to its constitutionality, nor does the dissenting opinion of that Court make any attempt to point out any such defect.

The provisions of the statute would seem to effectively entitle the respondent to the proceeds of the bank account and to effectively bar any claim of the "legal representatives of the deceased trustee", the petitioners, to the account. However, the petitioners made a claim thereto upon the authority of the cases of *Thatcher* v. *Trenton Trust Co., supra,* and *Travers* v. *Reid, supra,* which were decided by the Court of Chancery of New Jersey at approximately the same time in January, 1936, upon facts substantially similar to the facts in this case. In each of these two cases, the decision was rendered by a Vice-Chancellor, sitting as a trial judge, in an equity suit. Neither of the cases was reviewed by appeal and no appellate court of New Jersey has passed upon the validity of the 1932 acts. It is, therefore, necessary to determine whether these two decisions of the Court of Chancery were effective to nullify the legislative enactment and to settle the applicable local law.

POINT II.

In awarding the account to the respondent the Circuit Court of Appeals properly concluded that the decisions of the Court of Chancery did not truly express the local law.

Circuit Judge Biddle, in his opinion below, discussed fully the reasons advanced by the Vice-Chancellors in the *Thatcher* and *Travers* cases for their refusal to enforce the 1932 Act and pointed out the errors of those decisions (R., pp. 38 to 40). The Court of Chancery recognized that the purpose of the statute was to effectuate a change in the earlier law so that such tentative trust accounts would be valid in New Jersey, but held that the language thereof was confused, impractical and wholly unsatisfactory and that the Act by its terms did not dispense with the necessity

of the existence of all of the elements of a legal and valid trust, as required prior to the adoption of the statute. It is unfortunate that the language of the Act did not meet the standards of draftsmanship demanded by the Court of Chancery, but this cannot be deemed a proper objection to its validity and the test is not whether the Act could have been better drawn but, on the contrary, the question is whether the legislative intent is sufficiently clear therefrom. *Ott* v. *Braddock*, 119 N. J. L. 507; 197 Atl. 271 (Court of Errors and Appeals, decided January 26, 1938).

The Court of Errors and Appeals has said in *State* v. *Dolbow*, 117 N. J. L. 560, at page 565:

> "Every presumption is in favor of the constitutionality of legislation, and an act must be sustained unless clearly repugnant to the constitution of the state. *Attorney-General* v. *McGuinness*, 78 N. J. L. 346."

and, further, at page 566, the Court said:

> "It is the substance and spirit of the constitution that must remain inviolate, and if this has been preserved we should not avail ourselves of the matter of mere form to declare the Act void."

Another fundamental rule of statutory construction which was disregarded in the *Thatcher* and *Travers* decisions was clearly recognized in *Brown's Estate* v. *Town of Union*, 62 N. J. L. 142; 40 Atl. 632, affirmed in 65 N. J. L. 601; 48 Atl. 562, as follows (headnote):

> "When an act is susceptible of two constructions that which will validate it must be adopted, and not that which will render it unconstitutional."

Yet the Court of Chancery in said decisions assumed the statute to be unconstitutional and even advanced reasons as to its unconstitutionality which did not exist in the state of facts before that Court.

The petitioners have advanced as an argument that the Circuit Court of Appeals erred in refusing to apply the New Jersey statute as construed by the Court of Chancery but, as construed by the Court of Chancery, the statute cannot be applied. In fact, such construction determines that it may not be applied in any case in which its application would be helpful because, according to that Court, it is only applicable when all the elements of a legal and valid trust already exist. It is too obvious for argument to note that if all of the elements of a legal trust are present, the beneficiary would become entitled to the deposit by virtue of the trust without need of the aid of the statute. To attribute to the statute this limited effect is to render it meaningless and without any effect whatever, with the result that the legislative act and intent have been nullified, not construed.

Such a result has been expressly disapproved by New Jersey's court of last resort as violative of the fundamental law. In *Ott* v. *Braddock, supra,* that Court in considering the constitutionality of an act covering municipal employees said:

> "Section 4 of the 1934 act was patently intended to extend the preferential features of the act to those who had been removed from or demoted in such departments before its adoption, *otherwise it is totally unnecessary and superfluous in the statute,* as the first three sections thereof govern dismissals for reasons of economy taking place after its adoption and it would be pointless to add the fourth section to cover the same ground. * * * Where, as here, an act is plain and unambiguous in its terms, the rule is fundamental that there is no room for judicial construction, since the language is presumed to evince the legislative intent." (Italics supplied.)

The conclusion is inescapable that the Court of Chancery in the *Thatcher* and *Travers* decisions, and the trial court below, in refusing to apply the statute, disregarded fundamental rules of construction. No consideration was given to the presumption of the constitutionality of the act, nor to the presumption that the Legislature did not intend to adopt a superfluous law, nor to the rule that where an act is unambiguous in its terms there is no room for judicial construction because the language is presumed to evince the legislative intent, nor to the rule that where an act is susceptible of two constructions, that which will validate it must be adopted.

If such decisions carry the weight and authority for which the petitioners have argued, it would be necessary to recognize that a situation exists whereby the will of the people of the State of New Jersey, as expressed through its legislature, may be set aside solely by the decision of a trial judge.

Fortunately, this is not the fact. The effect and validity of the 1932 statute will ultimately be determined when the Court of Errors and Appeals of New Jersey passes upon this question. The decisions of the Court of Chancery do not settle the law of the state. The Court of Errors and Appeals in *Dorman* v. *West Jersey Title and Guaranty Co.*, 92 N. J. L. 487, said, at page 489, referring to decisions of the Court of Chancery:

> "It is sufficient to say that both of these cases were decided in the Court of Chancery, which is not binding upon this court."

Nor are the decisions of the Court of Chancery binding upon the Supreme Court of New Jersey. In *Flagg* v. *Johansen*, 124 N. J. L. 456, the Court, in an appeal from a judgment of the Fourth District Court of Union, indi-

cated its independence of the conclusions of the Court of Chancery, at page 461. It said:

> "We have examined the learned opinion of the Court of Chancery in *State Board of Milk Control* v. *Richman Co.*, 117 N. J. Eq. 296, but are not influenced thereby contrary to our view of the law herein expressed."

The conclusions of the Supreme Court upon the point under discussion were in direct disagreement with the quoted Chancery case.

That decisions of the Court of Chancery do not settle the law of the state and are not binding upon the Supreme Court of New Jersey, even while sitting as a trial court, and are not binding even upon the Court of Chancery, has been further demonstrated in the case of *McGoldrick* v. *Grebenstein*, 108 N. J. Eq. 335, 154 Atl. 844, wherein Vice-Chancellor Fielder held that an act modifying the law of descent (Laws of 1926, Chapter 41, p. 77) did not have retroactive effect as to lands acquired prior to its enactment. Subsequently, the Supreme Court of the State, at a trial term, in the case of *Stabel* v. *Gertel*, 11 N. J. Misc. 247, 165 Atl. 876, refused to follow the Chancery decision saying:

> "It is true that the case of *McGoldrick* v. *Grebenstein* seems to give countenance to the plaintiffs' contention that P. L. 1926, page 77, does not apply to land acquired by a wife prior to its passage, but the distinction between legislation pertaining to curtesy and that pertaining to descent, as hereinabove noticed, seems not to have been considered by the court, and the rule applicable to dower and curtesy was applied indiscriminately to all legislation pertaining to a husband's interest in his wife's real estate."

The Supreme Court ruling was affirmed by the Court of Errors and Appeals by a *per curiam* opinion in 111 N. J. L.

296, 168 Atl. 645. Furthermore, Vice-Chancellor Church, speaking for the Court of Chancery, in *Kicey* v. *Kicey*, 112 N. J. Eq. 459, 164 Atl. 684, also refused to follow the earlier decision of the same court in *McGoldrick* v. *Grebenstein*, referring to said decision as follows:

> "In the first place, the *McGoldrick* case gives neither reason nor authority for its statement in this behalf; and the conclusion is obviously based upon a premise which proves to be untrue in fact, as has been already pointed out."

It is interesting to note from that reported decision that because it was in disagreement with the earlier decision of the same court, it was first submitted by the Vice-Chancellor to the Chancellor for his approval, in accordance with the principles established for the conduct of the business of the Court of Chancery by the Chancellor, as enunciated in *Gregory* v. *Gregory*, 67 N. J. Eq. 7, 58 Atl. 287, which case has been cited by the petitioners in support of their third point. It is also pertinent to note here that in *Gregory* v. *Gregory*, *supra*, the Chancellor fully recognized that the decisions of the Court of Chancery do not settle the law of the state, for the Chancellor said:

> "In all ordinary cases it is essential to the conduct of the business of the Court that the Chancellor should decline to revise the opinion of a Vice-Chancellor or to refuse to follow his advice, and this, in my judgment, was the plain intent of the legislation. *Parties may well in such cases be left to obtain relief by review of the decree by appeal.*
>
> "Yet I deem it equally obvious that there are, or may be, exceptional cases, in which it would be the duty of the Chancellor to review the conclusions reached by a Vice-Chancellor, and to consider whether or not his advice should be followed. I can conceive of only two classes of such cases. One class, I think,

> would be composed of cases in which the decree advised is based upon a principle, or the conclusion reached is by a course of practice, in direct opposition to previous decisions of the Chancellor, or of some Vice-Chancellor whose advice has been acted upon by the Chancellor. The obvious reason is that the Court of Chancery must speak with one voice, and not discordantly. * * *" (Italics supplied.)

Thus, the usual uniformity of the decisions of the Court of Chancery is explained, but it is equally obvious that the opinion of one Vice-Chancellor is not considered as *stare decisis* upon the other Vice-Chancellors, as the petitioners have sought to argue so as to compel the Court of Chancery to follow its own earlier decisions if found erroneous upon reconsideration.

It is significant that although the petitioners' arguments have attempted to attribute to the decisions of the Court of Chancery the qualities of the doctrine of *stare decisis,* they have advanced no supporting authorities. They have been required to rely upon the case of *Ramsey* v. *Hutchinson,* 117 N. J. L. 222, wherein the Court of Errors and Appeals followed a construction of a local statute made by the Court of Chancery, saying that:

> "Irrespective of the inherent merit of this construction a ruling uniformly made by the Supreme Court (or the Court of Chancery) over a course of years should not be set aside by us except for cogent and important reasons."

However, it need only be said that the *Ramsey* case, decided in 1936, referred to a ruling made thirty-six years earlier in the case of *Biddle* v. *Pugh,* 59 N. J. Eq. 480, which in turn was based upon earlier decisions. And even here, the Court of Errors and Appeals indicated that it would set aside such a ruling for cogent and important

reasons. It is doubtful if there could exist a more cogent and important reason for disregarding a decision than that the decision is clearly erroneous.

The petitioners have argued that the *Thatcher* and *Travers* decisions have become the established law of New Jersey because the 1932 statute was reenacted subsequent to said decisions, in 1937, by the New Jersey Legislature and that by such reenactment the Legislature has adopted that interpretation of the statute placed upon it by the Court of Chancery. In disposing of this argument it need only be said that the 1937 reenactment of the statute was nothing more than the adoption by the Legislature of the revision of the entire statute law of the State, which revision was first authorized by P. L. 1925, Chapter 73, approved March 12, 1925, and was in course of preparation by a commission appointed for said purpose from said date to December 20, 1937, when the commission on revision and consolidation presented its final report to the Legislature. On the same day, the Revised Statutes of New Jersey 1937 was adopted and became effective. P. L. 1937, Chapter 188, December 20, 1937. To seriously contend that the 1937 reenactment of the 1932 act constituted legislative approval of the Court of Chancery's interpretation of that act is to distort a rule of construction to a ridiculous degree, for it can hardly be assumed that the New Jersey Legislature in completing the revision of the New Jersey statute law known as the Revision of 1937, a task of twelve years' duration, had anything in mind other than the completion of that task. Indeed, this Court in *Helvering* v. *Hallock*, 84 L. Ed. Advance Opinions 382, decided January 29, 1940, pointed out the pitfalls of such a rule of construction, saying, at page 389:

> "* * * To explain the cause of nonaction by Congress when Congress itself sheds no light is to venture

> into speculative unrealities. Congress may not have had its attention directed to an undesirable decision; and there is no indication that as to the *St. Louis Union Trust Co.* cases it had, even by any bill that found its way into a committee pigeonhole. * * * Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction of the Treasury and of Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle."

The *Helvering* case, too, disposed effectively of the petitioners' argument that the decisions of the Court of Chancery of New Jersey have received sanctity because they have not been challenged for a period of four years by any other state court. The present suit was instituted in May, 1937. Surely the petitioners are entitled to no advantage by reason of the lapse of time necessary to the litigation. The *Thatcher* and *Travers* decisions were made in January, 1936, a year after the bank account in question was created and the respondent's rights had accrued. As in the *Hallock* case, the present suit does not present a situation where the rights and interests of the parties were created in reliance upon the *Thatcher* and *Travers* decisions.

The recognition of the principle contended for by the petitioners that decisions of the New Jersey Court of Chancery, sitting as a trial court, voiding a legislative act, are binding upon other courts of equal jurisdiction, would constitute a distortion of the rule of *stare decisis*. As this Court said in the *Hallock* case, *supra*, at page 388:

> "We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic

need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience."

The above comment was addressed to a set of facts much more nearly within the rule of *stare decisis* than in the present case, but it is equally pertinent. To attribute to the Court of Chancery decisions the qualities of the rule of *stare decisis* requires a disavowal of those fundamental rules of construction above pointed out which have met the test of time and have received universal approval of the courts.

It appears conclusive that the decisions of the New Jersey Court of Chancery do not settle the law of the State of New Jersey. They are not binding upon the other state courts of New Jersey. As they do not settle the state law and are not controlling upon other state courts, then by what authority are the Federal courts so bound?

POINT III.

Until the effect of the 1932 statute is finally determined by New Jersey's Court of last resort or at least by an authoritative appellate court of that state, the Federal courts are free to determine whether or not the decisions of the Court of Chancery truly express the local law.

The respondent recognizes that where, as in this case, the jurisdiction of the Federal courts rests solely upon diversity of citizenship, and the issues involve the construction and application of a local statute, the parties and the Federal

courts must "search for and apply the entire body of substantive law governing an identical action in the state courts", as was said by this Court in *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202, at page 209, 82 L. Ed. 1290. No advantage exists to the litigants because the federal jurisdiction has been invoked, nor should any disadvantage result, and if in an identical action in the state courts those courts are free to disagree with the decisions of the Court of Chancery, the Federal courts likewise are free, and are charged with the duty of determining and applying the applicable local law.

In *Burns Mortgage Company* v. *Fried*, 292 U. S. 487, 78 L. Ed. 1380, a case involving the applicability of the Negotiable Instruments Law of Florida, this Court said, at page 496:

> "The absence of a decision by the Supreme Court of the State did not relieve the courts below from applying the Florida statute. Lacking such authoritative construction, their duty was to determine the question according to the accepted canons and in the light of the decisions of the courts of other states with respect to the same sections of the Negotiable Instruments Law.
>
> "If, as is admitted, the court of last resort of the state, holds that provision for payment of interest in instalments prior to maturity of principal does not render the sum payable so uncertain as to destroy negotiability, we think an added stipulation that overdue interest shall bear interest at a named rate until paid would not call for a different decision. Courts which have had occasion to consider the effect of the Act upon instruments of like tenor, have uniformly pronounced them negotiable. And cases decided prior to the adoption of the Act are to the same effect. No contrary decision has been brought to our notice. *Until the*

> *Supreme Court of Florida holds otherwise, we are justified in construing the Act in accordance with what we think its intent,* especially as this construction accords with the views of the courts of other states." (Italics supplied.)

The authorities relied upon by the petitioners to sustain their contention that the Federal courts are bound by the *nisi prius* Chancery decisions, do not support that view, nor has this Court ever recognized such a principle. To do so would constitute an abdication of the jurisdiction of the Federal courts, which has been always recognized as co-ordinate with, but not subordinate to, that of the state courts exercising comparable jurisdiction. Consequently, it cannot be concluded that in determining the applicable local law, the Federal courts are bound to follow lower state courts decisions which are not binding upon the state's appellate courts and which, therefore, do not settle the local law.

The cases of *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, and *Ruhlin* v. *New York Life Insurance Co.,* 304 U. S. 202, 82 L. Ed. 1290, do not support the argument of the petitioners and have no particular application to the issue presented. Those decisions left untouched the well established rule that the Federal courts are bound by the decisions of the highest court of the state in matters depending upon the construction of state statutes or constitution and which was reiterated by this Court as recently as February 26, 1940 in *Minnesota ex rel. Pearson* v. *Probate Court, Ramsey Co.,* Vol. 84, L. Ed. Advance Opinions 477, where this Court said, at page 479:

> "* * * For the purpose of deciding the constitutional questions appellant raises we must take the statute as though it read precisely as the highest court of the State has interpreted it."

Nor does the dissenting opinion of Mr. Justice Holmes in *Kuhn* v. *Fairmont Coal Co.,* 215 U. S. 349, 54 L. Ed. 228,

which has been cited by the petitioners, lend any further aid to their argument, because in that opinion Mr. Justice Holmes recognized that it was the decisions of state courts of last resort that settled the law for the state. And this Court, in *Erie Railroad Co.* v. *Tompkins, supra,* at page 79, quoting from the dissenting opinions of Mr. Justice Holmes in *Kuhn* v. *Fairmont Coal Co., supra,* and in *Black & W. Taxicab Co.* v. *Brown & Y. Taxicab Co.,* 276 U. S. 518, 532-536, 72 L. Ed. 681, 686-688, established that "the authority and only authority is the state, and if that be so, the voice adopted by the state as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word." Indeed, the reference to the opinion of Mr. Justice Miller in *Brine* v. *Hartford Fire Insurance Co.,* 96 U. S. 627, quoted by the petitioners from the dissenting opinion of *Kuhn* v. *Fairmont, supra,* serves to answer the argument advanced by Circuit Court Judge Jones in his dissenting opinion below, to the effect that the Court of Chancery decisions should have been followed to provide the desirable uniformity of decisions of the Federal courts with the State courts. The statement from *Brine* v. *Hartford Fire Insurance Co., supra,* as quoted by the petitioners, is:

> "To administer a different law is to introduce into the jurisprudence of the State of Illinois the discordant elements of a substantial right which is protected in one set of courts and denied in the other *with no superior to decide which is right.*" (Italics supplied.)

Such a situation has never existed with respect to the statute law of a state and since the decision of *Erie Railroad Co.* v. *Tompkins, supra,* no longer otherwise exists. This is because the state court of last resort is admittedly the final arbiter to decide and settle the law where there

are conflicting decisions between the lower state and the Federal courts as to the local law. Furthermore, the argument advanced by the dissenting opinion below for the desirability of uniformity of decisions as the justification for following the palpably erroneous *Thatcher* and *Travers* decisions, overlooks the duty of the Federal courts to apply the applicable local law and to determine such law where the state decisions lack authority and the state court of last resort has not yet finally determined it. That the discharge of such duty results in a temporary conflict of decisions, is no logical justification for evading it, because there is a final authority to decide which is right. If the logic of this argument is pursued to its end, the New Jersey Supreme Court would be bound by decisions of the Court of Chancery and such is not the case. An equally important error in such reasoning for the desirability of temporary uniformity of opinion is that it overlooks the requirement of section 34 of the Federal Judiciary Act of September 24, 1789 (28 U. S. C. A. 725), which requires that the 1932 statute shall be regarded as a rule of decision in trials in the Federal courts, and as the statute is plainly contradictory of the Chancery decisions, only the Court of Errors and Appeals of New Jersey is the superior authority to finally settle the local law.

In the case of *Blair* v. *Commissioner of Internal Revenue*, 300 U. S. 5, 81 L. Ed. 465, cited by the petitioners as authority for the proposition that a decision of an intermediate appellate court is binding upon the Federal courts, it need only be said that in that case this Court found the decision of the state appellate court referred to was *res adjudicata*, this Court saying, at page 10:

> "In this instance, it is not necessary to go beyond the obvious point that the decision was in a suit be-

> tween the trustees and the beneficiary and his assignees, and the decree which was entered in pursuance of the decision determined as between these parties the validity of the particular assignments."

The case of *New York Life Insurance Co.* v. *Ruhlin,* 25 Fed. Supp. 65, also cited by the petitioners, apparently relied upon *Blair* v. *Commissioner, supra,* notwithstanding that the decision of the intermediate Appellate Court, therein referred to, was *res adjudicata.*

Circuit Court Judge Biddle, in his opinion below, fully considered the case of *Erie Railroad Co.* v. *Hilt,* 247 U. S. 97, 62 L. Ed. 1003, which case is strongly relied upon by the petitioners, and duly pointed out that that decision did not hold that the Federal courts were bound by the decision of a trial judge in the construction of a state statute. In that case, this Court was in agreement with the construction placed upon the New Jersey statute by the New Jersey Supreme Court, the Court saying, at page 100:

> "The words of the statute seem to us to require a different construction from that adopted, and they have been given their full literal meaning by the Supreme Court of the state in the case of an infant younger than the plaintiff. *Barcolini* v. *Atlantic City and S. R. Co.,* 82 N. J. L. 107, 81 Atl. 494",

meaning that, in the opinion of this Court, the construction adopted by the lower Federal court was erroneous and the construction adopted by the Supreme Court of New Jersey was reasonable. But Mr. Justice Holmes, speaking for the court, continued:

> "In view of the importance of that tribunal in New Jersey, although not the highest court in the state,

> we see no reason why it should not be followed by the courts of the United States even if we thought its decision more doubtful than we do."

It is suggested respectfully that the late Mr. Justice Holmes probably would have been among the first to acknowledge that that portion of the opinion last quoted was not necessary to the decision of the case. In any event, it can hardly be relied upon as authority in the case under review, where the effect of the Chancery decisions is to void the legislative act rather than to construe it, and where there can be no substantial doubt as to the unsoundness of such decisions. Furthermore, the decision of the New Jersey Supreme Court, referred to and followed in the *Hilt* case, was rendered by the state Supreme Court in 1911, seven years earlier, while that court was sitting as an appellate court in the review of a judgment of the New Jersey Circuit Court.

As for the decision of this Court in *Erie Railroad Co.* v. *Duplak*, 286 U. S. 440 (1932), 76 L. Ed. 1214, also cited by the petitioners, it should be noted that the facts therein were substantially the same as in the *Hilt* case, involving the same local statute, and that this Court simply followed its decision in the *Hilt* case. Because of the *Hilt* and *Duplak* decisions, the petitioners have sought to argue that the Court of Chancery of New Jersey is of equal rank and importance with the Supreme Court in the judicial system of that State, so that it may be concluded that the *Hilt* ruling should apply with equal force to decisions of the Court of Chancery. The respondent does not care to take issue with the proposition of the relative general importance of these courts in the New Jersey judicial system, because it is believed that it will better serve the determination of the issues here involved

to compare the functions of the respective courts in the cases under consideration, as well as the effect of the respective decisions. The decisions of a trial court which refuse to give effect to a duly adopted legislative act, such as the *Thatcher* and *Travers* decisions, cannot be truthfully compared as of equal weight and effect with the decision of the Supreme Court, sitting as an appellate court and giving literal effect to the expressions of a legislative act. The fact that the judges of both the Court of Chancery and the Supreme Court receive the same salaries, that the Court of Chancery is first mentioned before the Supreme Court in the state constitution, that both courts have statewide original jurisdiction in their respective spheres, and that the Chancellor is the President of the Court of Errors and Appeals, can offer little aid to the issue under review. Along the same lines, it can also be noted that in the composition of the Court of Errors and Appeals the Supreme Court has nine votes out of a total of sixteen and the Court of Chancery but one (New Jersey Constitution, Article VI, Section 2, Revised Statutes 1937, 2:4-1), and that while sitting in review of a decree of the Court of Chancery, by long established custom, even this one vote is lost because the Chancellor may not participate in a review of his own decisions. Moreover, the New Jersey Supreme Court is a court of important appellate, as well as original, jurisdiction, whereas the Court of Chancery is without appellate jurisdiction in any case (New Jersey Constitution, Article VI, Section 5), and the Supreme Court is a court of last resort in appeals from a judgment of a Circuit Court in a contested election case and in appeals from the Court of Common Pleas (Revised Statutes of New Jersey, 2:27-350; *DeFeo* v. *People's Gas Co.*, 104 N. J. L. 156, 138 Atl. 875).

It is unnecessary to comment upon the remaining cases referred to by the petitioners in which the Federal courts

have followed the decisions of intermediate appellate courts of the state in the construction of local statutes. Those cases have been fully commented upon in the majority opinion of the Circuit Court of Appeals. It is significant, however, that the petitioners have not cited a single authority in support of their argument that the Federal courts, in the absence of any decision by the court of last resort of a state upon a local statute, are bound by a construction placed thereon by a trial court.

It is submitted that the applicable rule has been correctly stated by the Circuit Court of Appeals for the Second Circuit in the case of *Irving National Bank* v. *Law*, 9 Fed. (2d) 536, wherein that court, speaking through Circuit Judge Learned Hand, in refusing to follow the construction of a New York statute by the Appellate Division of the New York Supreme Court, an intermediate Appellate Court, said:

> "We understand the doctrine to mean that the highest court of the state, by declaring what a statute means, settles it, because there is no authority which can gainsay it. Yet, however conclusive between parties to a suit the decision of a lower court is of course not authoritative upon the highest court; the statute necessarily remains *in nubibus*, and its construction may be as it will."

Most recently, this Court indicated its accord with the rule as so stated, in the case of *Russell* v. *Todd*, 84 L. Ed. Advance Opinions 517, wherein this Court was required to determine the applicable Statute of Limitations under the law of New York where the precise question raised had not been decided by the New York Court of Appeals. This Court said, at page 523:

> "In the absence of a definitive ruling by the highest court of the state, we accept the decision of the Ap-

pellate Division and the reasoning of the Court of Appeals upon which it rests as persuasive that the three-year statute does not apply to suits like the present where the remedy is exclusively equitable. See *Wichita Royalty Co.* v. *City Nat. Bank,* 306 U. S. 103, 107, 83 L. Ed. 515, 517, 59 S. Ct. 420."

The above quoted language of the decision indicates clearly that this Court followed the decision of the Appellate Division, an intermediate Appellate Court, not because it felt bound by the said decision in the absence of a ruling upon the precise question by the court of last resort, but because the reasoning upon which the decision rested was persuasive.

It is submitted that the Circuit Court of Appeals correctly stated the rule, namely: That the Federal courts should in all instances follow the law of the state with respect to the construction of state statutes. Where that law has been determined by the courts of last resort their decisions are *stare decisis,* and must be followed irrespective of the Federal courts' opinion as to what the law ought to be. As to pronouncements of other state courts, however, the Federal courts are not so bound, but may conclude that the decision does not truly express the state law.

The conclusions of Circuit Judge Buffington, as stated in his concurring opinion below, emphasize more particularly the issue here presented. He said (R., p. 40):

"I concur in the conclusion reached by the court. The statute of New Jersey is clear and unambiguous; it calls for no construction. But the question is as to the enforcement of a law passed by a sovereign state in a matter of which it has jurisdiction. The wording of the statute is applicable to the facts of the present case. In the absence of any decision by the court of

highest resort of New Jersey holding the act unconstitutional and inapplicable, I am of opinion that this court is free to apply the statute to the facts of this case. I therefore concur in the conclusion reached."

POINT IV.

The judgment of the Circuit Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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